Supreme Court, U.S.
FILED
941376 FEB 14 1995
OFFICE OF THE CLERK

No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

ZARKO ILIC,

Petitioner,

vs.

LIQUID AIR CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

ZARKO ILIC, PRO SE
2500 Bay Leaf Dr.
Orlando, Florida 32837
(407) 859-7479

43pp

QUESTIONS PRESENTED

1. Does Watson v. Forth Worth Bank and Trust, 108 S. Ct. 2777 (1988), require that this case be analyzed under disparate impact theory?

2. Does Antonopulos v. Aerojet-General Corp., E.D. Cal. 1968, 295 F.Supp. 1390, 1395 and Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970), preclude holding against plaintiff when plaintiff had written the wrong words and circled the wrong base in filling out first questionnaire?

3. Does Thompkins v. Morris Brown College, 752 F.2d 558 (11th Cir. 1985), Caban-Wheeler v. Elsea, 904 F.2d 1549 (11th Cir. 1990), and Lewis v. Smith, 731 F.2d 1535 (11th Cir. 1984), require, that when direct evidence of discrimination or retaliation is introduced, a remand?

4. Does Lewis v. Smith, 731 F.2d 1535 (11th Cir. 1984), require, that when the district court failed to state what standard of proof was applied in promotion, a remand?

5. Does Caban-Wheeler v. Elsea, 904 F.2d 1549 (11th Cir. 1990), require, that when the magistrate did not address the issue of fabricated memos, a remand?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITATIONS iii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 4

I. **The decision below present an important, unanswered question, and conflicts with Supreme Court: Watson v. Fort Worth Bank and Trust, 108 S.Ct. 2777 (1988), that there is simply no merit in any of the issues or contentions presented by the appellant** 4

II. **The Eleventh Circuit has rendered a decision in conflict with the decision of another circuits and with precedent of the Eleventh Circuit** 6

III. **The Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision** 10

CONCLUSION 14

Page

TABLE OF CITATIONS

Cases Cited:

Antonopulos v. Aerojet-General Corp.,
E.D. Cal. 1968, 295 F.Supp. 1390 ..... i, 6, 14

Caban-Wheeler v. Elsea,
904 F.2d 1549 (11th Cir. 1990) ..... i, 7, 8, 9, 14

Lewis v. Smith,
731 F.2d 1535 (11th Cir. 1984) ..... i, 8, 14

Sanchez v. Standard Brands, Inc.,
431 F.2d 455 (5th Cir. 1970) ..... i, 7, 14

Thompkins v. Morris Brown College,
752 F.2d 558 (11th Cir. 1985) ..... i, 7, 8, 14

Watson v. Forth Worth Bank and Trust,
108 S. Ct. 2777 (1988) ..... i, 4, 5, 14

Statutes Cited:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 2

42 U.S.C. § 2000e-2 ..... 1, 2, 3

42 U.S.C. § 2000e-3 ..... 1, 3

APPENDIX

Appendix A - January 23, 1995 Eleventh
Circuit order denying rehearing 1a

Appendix B - November 17, 1994 Eleventh
Circuit order affirming judgment 2a

Page

Appendix C - October 20, 1993 Order 3a

Appendix D - Supplemental Report and Recommendation 5a

Appendix E - Report and Recommendation 7a

Appendix F - 42 U.S.C. § 2000e-2 & 2000e-3 ..... 17a

Appendix G - Excerpts from plaintiff's Exhibit No. 96 ..... 18a

Appendix H - Excerpts from plaintiff's Exhibit No. 97 ..... 19a

Appendix I - Excerpts from plaintiff's Exhibit No. 129 ..... 20a

Appendix J -Excerpts from plaintiff's Exhibit No. 26 ..... 22a

Appendix K - Excerpts from plaintiff's Exhibit No. 27 ..... 22a

Appendix L - Excerpts from trial testimony of Bruno Fraeyman 23a

OPINIONS BELOW

Report and Recommendation by the United States Magistrate Judge that this case be dismissed with prejudice, is unreported. (App. E, 7a-16a). Supplemental Report and Recommendation, is also unreported. (App. D, 5a-7a). The Order and final judgment of the United States District Court of Middle District of Florida, is unreported. (App. C, 3a-5a). The decision of the Eleventh Circuit Court of Appeals, affirming judgment, is unreported. (App. B, 2a-3a). The order of the Eleventh Circuit Court of Appeals denying a Suggestion of Rehearing En Banc, is unreported. (App. A, 1a-2a).

STATEMENT OF JURISDICTION

This Court's jurisdiction to review a post-judgment Order of the United States Court of Appeals for the Eleventh Circuit, is invoked pursuant to 28 U.S.C. § 1254(1).

Petitioner brought this case in the United States District Court for the Middle District of Florida, pursuant to 42 U.S.C. § 2000e-2 & 2000e-3. A final judgment in Respndent's favor was entered by the District Court on October 20, 1993, and Petitioner filed a timely notice of

appeal to the Eleventh Circuit Court of Appeals on October 25, 1993. Title 28 U.S.C. § 1291 provided federal appellate jurisdiction over the final judgment of the district court.

The Eleventh Circuit affirmed the district court's decision on November 17, 1994. (App. B, 2a-3a). Petitioner filed a timely Suggestion of Rehearing En Banc. The suggestion was denied on January 23, 1995. (App. A, 1a-2a). This Petition for Writ of Certiorari is timely filed within 90 days of November 17, 1994, by February 17, 1995.

STATUTES INVOLVED

42 U.S.C. § 2000e-2 provides in pertinent part:

(a) It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive

or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-3, provides in pertinent part:

(a) It shall be unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, ... to discriminate against any individual, ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, ...

Reproduced in Appendix F at 17a-18a.

STATEMENT OF THE CASE

This action was brought by Petitioner under Title VII of the Civil Rights Act of 1964, as amended, Section 42 U.S.C. § 2000e-2(a)(1)(2) and Section § 2000e-3(a) to correct unlawful employment practices on the basis of religion, national origin and retaliation.

Trial commenced without a jury before the United States Magistrate Judge, David A. Baker on July 12, 1993 and was concluded on July 15, 1993. Report and Recommendation was submitted to the Honorable Anne C.

Conway on August 24, 1993. (App. E, 7a-17a). Supplemental Report and Recommendation was submitted on September 15, 1993. (App. D, 5a-7a). Judgment was rendered in favor of the Respondent by Order of October 20, 1993. (App. C, 3a-5a).

The Eleventh Circuit affirmed the district court's decision on November 17, 1994. (App. B, 2a-3a). The appellate court's ruling that there is simply not merit in any of the issues or contentions presented by the appellant, is the Order sought to be reviewed in this Court.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW PRESENT AN IMPORTANT, UNANSWERED QUESTION, AND CONFLICTS WITH SUPREME COURT: WATSON V. FORT WORTH BANK AND TRUST, 108 S. CT. 2777 (1988), THAT THERE IS SIMPLY NO MERIT IN ANY OF THE ISSUES OR CONTENTIONS PRESENTED BY THE APPELLANT.

The Eleventh Circuit held that, there is simply no merit in any of the issues or contentions presented by the appellant.

Ilic argued that the District Court had erred in failing to apply "disparate impact" analysis to his claims of discrimination in promotion. Ilic challenged Liquid Air's subjective criteria used to make employment decision. In Watson this Court held that:

> ... the necessary promise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.

Id. 2785.

Also, this Court held that:

> Neither the District Court nor the Court of Appeals has evaluated the statistical evidence to determine whether petitioner made out a prima facie case of discriminatory promotion practices under disparate impact theory. It may be that the relevant data base is too small to permit any meaningful statistical analysis, but we leave the Court of Appeals to decide in the first instance, on the basis of the record and the principles announced today, whether this case can be resolved without further proceedings in the District Court. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

Id. at 2791.

Thus, this case presents conflict with Watson, and requires guidance on an important but unanswered question of federal civil rights law.

II. THE ELEVENTH CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH THE DECISION OF ANOTHER CIRCUITS AND WITH PRECEDENT OF THE ELEVENTH CIRCUIT

1. The issue here is that Ilic in filling first questionnaire supplied by the EEOC, circled wrong base of discrimination "retaliation" and has written the words "very outspoken". This omission has been corrected by EEOC in official charge of discrimination.

As Judge MacBride of Easter District of California wrote in a Title VII case:

> We are not dealing with businessmen-plaintiffs or plaintiffs accustomed to consulting lawyers about their rights. This law is a remedial one, and the Congressional purpose would not be furthered by making plaintiffs of the kind with which we are concerned, members of the working class who are generally without substantial higher education, dot every "i" and cross every "t" on their way to the courthouse.

Antonopulos v. Aerojet-General Corp., E.D. Cal. 1968, 295 F.Supp. 1390, 1395.

On same issue, in his typically colorful manner, Chief Judge Brown of the Fifth Circuit has characterized the encounter between a Title VII complainant and "a huge

industrial employer" as a "modern day David and Goliath confrontation." In such a confrontation, surely Goliath should not be allowed to fell David with the help of legal technicalities. The most elementary principles of justice require us to remove this club and compel a battle on the *merits* of the controversy. Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970).

In Sanchez the District Court had found in favor of the defendant. The Court of Appeals reversed and remanded the judgment of the District Court and because the District Court approach is not in keeping with the words of the statute, with the intent of Congress, or with the regulations adapted by the EEOC.

2. On issue of direct evidence in this case the Eleventh Circuit is in direct conflict with precedent set in Thompkins v. Morris Brown College, 752 F.2d 558 (11th Cir. 1985) and Caban-Wheeler v. Elsea, 904 F.2d 1549 (11th Cir. 1990).

The statement made by Vice President Fraeyman constitute direct evidence of retaliatory intent. This statement was introduced through Ilic"s testimony, and was not rebutted through cross-examination or subsequent

testimony. Also, Ilic introduced documentary direct evidence through statements made by Fraeyman and Smith.

These statements of employer reflect discriminatory or retaliatory attitude correlating to discrimination or retaliation complained of by Ilic.

In Thompkins the Eleventh Circuit state:

> Thus, this case must be remanded to the district court for a determination of whether Threatt and Payne made the discriminatory statements. If the district court finds that the statements were made, it must enter judgment for Plaintiff. See Lewis v. Smith, 731 F.2d 1535 (11th Cir. 1984). If the court finds that the statements were not made, it must clearly articulate this finding.

Decision in the instant case, that there is simply no merit in any of the issues or contentions presented by the appellant is inconsistent with Lewis, Thompkins and Caban-Wheeler.

3. On promotion, in Lewis the situation was similar to the present case. In Lewis Court stated:

> The district court, in finding that the plaintiff was less qualified than those hired, failed to state what standard of proof was applied. Under most circumstances a remand for the district court to make further findings in accordance with law would be the appropriate action.

4. The most significant to the instant case is the comparison of Caban-Wheeler and the instant case. Ilic has shown a pattern of numerous proven fabricated facts, falsified and forged documents to be used as a pretext for termination.

Five memos and two statements were written regarding Ilic which were placed in his personnel file in an attempt to support the termination of Ilic for insubordination and disruptive activity. Expert testimony of Gerald R. McMenamin, PhD, Forensic Linguistics, concluded that these five memos and two statements were written by Charles Thompson, assistant manager who terminated Ilic. His testimony at trial state: "It's simply, let me say virtually impossible that you could have five people, five different writers, share this large a set of characteristics or even part of the set, even just the words and phrases, ..."

Also, was indroduced testimony of another expert by Forensic Questioned Document Examiner.

The magistrate did not address the issue of fabrication of these five memos and two statements.

In Caban-Wheeler court state:

> Moreover, the court failed to address plaintiff's contention that her supervisor, Melba Hill, tried

> to create evidence of progressive discipline, by for instance, creating a memo dated July 6, 1984.

and further,

> The magistrate did not address the issue of whether Hill, fabricated the memo to support plaintiff's suspension, ... If the memo was fabricated, this would provide pivotal evidence on the issue of intent, and could very well affect the ultimate finding on the question of discrimination.

Decision in the instant case, that there is simply no merit in any of the issues or contentions presented by the appellant is virtually ignoring its own precedent.

III. THE ELEVENTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Facts on promotion issue are:

Mr. Ilic was not promoted to the Manager or Assistant Manager positions referred to in his Charge because he never indicated an interest in being promoted to these positions. (App. H, 20a).

Testimony of Barry Lucht state: Q. Did you consider Zarko Ilic headed for promotion to the plant? A.

No, did not. Q. Could you tell us why? A. Nobody ever called to say he wanted it."

Testimony of Bruno Fraeyman that Ilic received bonus for recognizing his efforts in training and that Ilic was giving training to new operators during his time.

Letter from Bruno Fraeyman that John McGrew, plant manager has a high opinion of him, he is knowledgeable on plant and computer, has been operator for 20 years and clearly deserve to do something else, example become assistant plant Mgr. or plant Mgr.

Testimony of Robert Ferguson alleged that he asked Ilic if he would be interested in a one-man plant which is a manager position.

Ilic was in charge during manager's absence for total of four weeks in 1989 and received a letter which states: "Your knowledge of the process and dedication to duty ..."

Liquid Air started using word attitude at trial as pretext for discrimination. The Eleventh Circuit decision that there is simply no merit in any of the issues or contentions presented by appellant has so far departed from the accepted and usual course of judicial proceedings,

as to call for an exercise of this Court's power of supervision.

Ilic has shown that proffered explanation is unworthy of credence is a matter of examining Liquid Air's vacillations.

On April 3, 1990, Ilic told several of his co-workers that he was carrying a gun. (App. G, 19a)

In late March 1990, the Company discovered that Ilic was carrying a gun on his person while at work. (App. H, 20a).

Liquid Air understands that one or more drivers have stated that Ilic was carrying a gun on his person while at work. Liquid Air does not know the identity of such driver or drivers and does not know if he or they searched Ilic. (App. I, 21a).

The Eleventh Circuit decision that there is simply no merit in any of the issues or contentions presented by appellant has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

It is clear that Ilic has attitude even when Liquid Air do not have written procedures and Ilic can not comply with the same as shown below.

All of the mistakes discovered by the FDA were attributed to your omission of the required information on the required forms.

If this attitude affects your compliance with Company policy and procedures, ...(App. J, 22a).

FDA report state:

1. There are no written procedures for production and process control. The lack of written procedures and records was determined by asking Mr. Robert W. Ferguson for the procedures or records and he replied that there were none that he could find.

2. A review of the firm's analytical records revealed that some oxygen and nitrogen analytical records do not have the initials or signature showing that the original records have been reviewed for accuracy and/or completeness by a second person.

He stated that he would contact corporate headquarters the following day to obtain written

procedures for production and process control. (App. K, 22a-23a).

Testimony of Bruno Fraeyman state:

Q. Let me show you what has been marked as Exhibit 26. Can you identify Exhibit Number 26, please?

A. Yes. It's a written warning letter.

Q. And this is about an FDA form?

A. Yes.

Q. It appears that you're blaming Mr. Ilic for a lack of procedures at the plant; is that right?

A. Yes, that's right. (App. L, 23a).

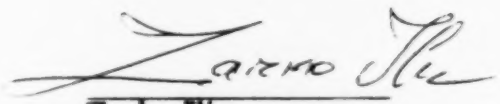
The Eleventh Circuit decision that there is simply no merit in any of the issues or contentions presented by appellant has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

CONCLUSION

The decision below conflicts with Watson, Antonopulos, Sanchez, Thompkins, Caban-Wheeler and Lewis. It presents an important unanswered question that there is simply no merit in any of the issues or contentions

presented by the appellant. For the foregoing reasons, certiorari should be granted.

Respectfully submitted,



Zarko Ilic, pro se
2500 Bay Leaf Dr.
Orlando, Florida 32837
(407) 859-7479

APPENDIX A - JANUARY 23, 1995 ELEVENTH CIRCUIT ORDER DENYING REHEARING

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-3332

ZARKO ILIC,

Filed January 23, 1995

Plaintiff-Appellant,

versus

LIQUID AIR CORP.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND

SUGGESTION(S) OF REHEARING EN BANC

Before: ANDERSON and CARNES, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/

UNITED STATES CIRCUIT JUDGE

APPENDIX B - NOVEMBER 17, 1994 ELEVENTH CIRCUIT ORDER AFFIRMING JUDGMENT

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-3332
Non-Argument Calendar
D. C. Docket No. 92-199-CIV-ORL-22

ZARKO ILIC,

Plaintiff-Appellant,

versus

LIQUID AIR CORP.,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
(November 17, 1994)

Before ANDERSON and CARNES, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM:

This is an appeal from an adverse ruling in a Title VII case, 42 U.S.C. § 2000e et seq. The matter was tried before a United States Magistrate Judge who filed

extensive findings and recommendations by oral dictation into the record on July 15, 1993, by a formal Report and Recommendation dated August 24, 1993, and by a Supplemental Report and Recommendation dated September 15, 1993. These findings of fact and conclusions of law were reviewed de novo by the district court and adopted and confirmed. Judgment was entered in favor of the defendant/appellee.

In his pro se briefs, appellant suggests many issues and erroneous rulings. We have reviewed these in detail. The record in this case provides ample evidentiary support for the factual findings made and thus they are not clearly erroneous. We also conclude that the correct rules of low were applied by both the United States Magistrate Judge and by the United States District Court. There is simply no merit in any of the issues or contentions presented by the appellant.

The judgment is affirmed.

APPENDIX C - OCTOBER 20, 1993 ORDER

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ZARKO ILIC,

Plaintiff,

-vs- CASE NO. 92-199-CIV-ORL-22

LIQUID AIR CORPORATION,

Defendant.

ORDER

This cause is before the Court on the Magistrate Judge's Report and Recommendation (Dkt. 101), filed August 24, 1993 and a Supplemental Report and Recommendation (Dkt. 107), filed September 15, 1993.

The Magistrate Judge recommends that judgment be found for Defendant, and that the case be dismissed with prejudice.

After an independent de novo review of the entire record in this matter, including Plaintiff's Objections, the Court agrees entirely with the findings of fact and conclusions of low in the Report and Recommendation. Therefore, it is ORDERED as follows:

1. The Report and Recommendation filed August 24, 1993 (Dkt. 101) and the Supplemental Report and Recommendation filed September 15, 1993 (Dkt. 107), are adopted and confirmed and made part of this Order.

2. This action is DISMISSED WITH PREJUDICE.

3. The Clerk is directed to enter final judgment in favor of Defendant Liquid Air Corporation and against Plaintiff Zarko Ilic.

DONE AND ORDERED in Chambers in Orlando, Florida, this 20th day of October, 1993.

s/

ANNE C. CONWAY
United States District Court

Copies to: Zarko Ilic, pro se
Counsel of Record

APPENDIX D - SUPPLEMENTAL REPORT AND RECOMMENDATION

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ZARKO ILIC,

Plaintiff,

-vs- Case No. 92-199-Civ-Orl-22

LIQUID AIR CORPORATION,

Defendant.

SUPPLEMENTAL REPORT AND RECOMMENDATION

TO THE UNITED STATES DISTRICT COURT

This cause came on for consideration without oral argument on the following motion filed herein:

MOTION: DEFENDANT'S OBJECTION AND MOTION FOR MODIFICATION TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AND RECOMMITMANT TO THE MAGISTRATE JUDGE (#104)

FILED: September 3, 1993

With respect to Plaintiff's retaliation claim, to the extent not implicity included in the previous Report and Recommendation entered August 24, 1993 (Doc. No. 101), the issue is hereby clarified as follows. Plaintiff failed to prove a prima facie case of retaliation against him based on his having filed a discrimination claim. He simply failed to establish *any* causal link between his filing a claim and subsequent employment actions. As previously noted, Plaintiff asserted he was being retaliated against even before he filed a claim - a logical impossibility.

Moreover, the findings and conclusions set forth in the original Report and Recommendation also apply to this claim. Plaintiff failed to show that Defendant's stated reasons for adverse actions were pretextural.

Failure to file written objections to the proposed findings and recommendations contained in this report

within ten (10) days of the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Respectfully recommended this 15th day of September, 1993.

s/
DAVID A. BAKER
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Leo P. Rock, Jr., Esquire
Edward R. Gay, Esquire

APPENDIX E - REPORT AND RECOMMENDATION

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ZARKO ILIC,

Plaintiff,

v. CASE NO. 92-199-CIV-ORL-22

LIQUID AIR CORPORATION,

Defendant.

REPORT AND RECOMMENDATION

TO THE UNITED STATES DISTRICT COURT:

I. INTRODUCTION

Plaintiff Zarco Ilic (Ilic) brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, against Liquid Air Corporation (Liquid Air). Pursuant to 42 U.S.C. § 2000e-5(f)(5), the presiding District Judge referred the matter to the United States Magistrate Judge for all further proceedings, including trial. (Doc. No. 71). A four day trial was held July 12 - 15, 1993. Having heard the evidence and considered the arguments presented by counsel, the undersigned issues this Report and Recommendation for appropriate disposition of this case.

II. GOVERNING LAW

42 U.S. C. § 2000e-2(a)(1) provides, "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

The Supreme Court has established an analytical framework for Title VII cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and

their progeny. Under this framework, a plaintiff has the burden of proving a prima facie case by the preponderance of the evidence. A plaintiff can meet this burden if he can show (1) he belongs to a protected group; (2) he applied for and was qualified for the job; (3) despite his qualifications, he was denied the position; and (4) a person outside the protected group got the position.[1] *McDonnell Douglas*, 411 U.S. at 802. If the plaintiff succeeds in proving a prima facie case, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for rejecting the plaintiff. *Id.* This is a burden of production. *Burdine*, 450 U.S. at 255. The employer does not need to persuade the court that it was actually motivated by the proffered reasons. *Id.* at 254. Should the employer carry this burden, the plaintiff must then prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were merely a pretext for discrimination. *Id.* at 253.

The Court recently renewed its support for this mode of analysis in *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993). Consistent with its prior cases, the Court held that the ultimate burden of persuading the trier of fact

that the employer intentionally discriminated against the plaintiff remains with the plaintiff at all times. *Id.* at 2747. The Court provided a further explanation of the shifting burdens and held that even if the trier of fact finds that the employer's proffered reasons are not believed, the plaintiff must still prove that the employer's action was the product of intentional discrimination. *Id.* at 2751.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Ilic alleges that Liquid Air violated Title VII in a number of ways. Specifically, he claims that Liquid Air treated him differently from other similarly situated employees because of his national origin, Yugoslavian, and his religion, Eastern Orthodox. He alleges Liquid Air discriminated against him by not offering him overtime opportunities which were offered to other employees; by not promoting him to two management level positions; and finally, by terminating his employment with Liquid Air.

Ilic's career with Liquid Air began in 1968. In the late 1980s his relationship with Liquid Air soured. The evidence demonstrated that Ilic resented and was frustrated by his not being promoted. He was upset by the promotion

of other individuals who had less seniority than he had. This resentment and frustration manifested itself in his repeated challenges to and confrontations with management and other employees regarding various aspects of plant operations.

The situation was exacerbated, at least during a period of time, by the absence of effective management at the plant. For a period of time there was no assigned manager. Management officials came to the plant on a temporary basis, but the entire plant was swiftly descending to a level that would not even support operations. This instability and lack of leadership understandably caused frustration for all employees, and particularly for someone of Ilic's seniority and technical background. Seeing other employees that he considered less qualified running the plant created great frustration for Ilic.

Management interpreted his conduct as poor attitude; an attitude that was not at all conducive to efficient functioning of the plant. A mutual hostility developed ant fed upon itself, breeding additional mistrust between Ilic and management. At various points both parties began consciously to document incidents to support

their respective views of the derelictions or improper conduct by the other side.

Ilic asserts that he was unfairly reprimanded or otherwise disciplined on several occasions. The evidence shows that Ilic began insisting that he be given written instructions before he would perform some tasks, and then claimed that the act of singling him out for written instructions should be construed as a form of discipline and harassment. This inconsistent attitude led management to some of its conclusions about Ilic's approach to his job.

The evidence also shows that at various times Ilic wanted to do what he wanted to do, when he wanted to do it, without particular regard to what he had been asked to do and what needed to be done in order to accomplish the general and overall purposes of production at the plant. That may, in part, flow from his prior experience of having been in a union shop where job descriptions are more narrowly drawn and more rigidly enforced. It may also have been the result of his frustration and resentment. In any event, it did manifest itself in an attitude that management could properly conclude made Ilic an unproductive employee requiring reprimands and

discipline. Further, Ilic has not shown that his national origin or religion had anything to do with the way he was treated regarding the discipline he received, including the incident involving the FDA report.

Ilic also complains that he was not provided with opportunities to work overtime commensurate with other employees. Liquid Air has demonstrated that Ilic often refused overtime and, on at least one occasion, made sarcastic responses to offered overtime, indicating that he didn't even know if he would be alive when the overtime was required. Again, management was well within its rights to conclude that this displayed an attitude not conducive to harmony and good production.

The evidence establishes that Ilic was not unfairly or improperly treated with respect to overtime or discipline, and even if Liquid Air's conduct in these matters could be interpreted as unfair, there is no evidence at all that Liquid Air treated Ilic unfairly because of his religion or national origin.

Ilic contends that Liquid Air promoted two employees with less qualifications and less seniority. Liquid Air argues that Michael Bostain and Charles Thompson

were more qualified than Ilic and that it was within their prerogative to select them for promotion. Ilic refers to Liquid Air's policy of promoting from within based upon seniority and seeks to infer discriminatory intent from Liquid Air's failure to adhere to that policy when it promoted Bostian and Thompson. Liquid Air established that the preference for an employee with seniority entered the decision making process only when all other factors were equal. Given the attitude that Mr. Ilic had displayed, Liquid Air was well within its rights to decide that Ilic was not qualified to manage the plant and to choose Bostian and Thompson over Ilic.

Ilic points to incidents involving Bostian and Thompson which he believes should have disqualified them from promotion consideration. The facts surrounding these incidents are in dispute, but need not be decided here. Even if the events occurred as Ilic described them, it was still within Liquid Air's prerogative to conclude that Bostian and Thompson were better qualified for the position. The incidents in question were isolated in nature and are not comparable to the general uncooperative attitude that Ilic displayed.

Ilic has not proven that he was qualified for the promotions in question and thus has not established a prima facie case of discrimination with regard to his failure to promote claim.

Finally, Ilic has not established a prima facie case of discriminatory discharge. To establish a prima facie discharge case, a plaintiff must prove that he is a member of a protected class, that he was discharged, and he must produce evidence of disparate treatment from which the court may infer a causal connection between the plaintiff's protected status and the discharge. Schlei & Grossman, *Employment Discrimination Law* 595-96 (2d ed. 1983).

Ilic had difficulty accepting Thompson as plant manager. This difficulty was obvious in Ilic's attitude and job performance. Despite his technical ability and demonstrated capacity as an operator, Ilic failed to recognize that he was still in a subordinate position and tried to challenge the decision to promote Thompson. When that failed, he repeatedly questioned Thompson's authority. Ilic went beyond expressing disagreement with management decisions or making suggestions for more efficient plant operations. His challenges to authority were

frequent and disruptive. Management was entitled to deal with them and was entitled to resort to termination as the ultimate solution to the problem.

Ilic has not presented any evidence of disparate treatment. Even assuming, *arguendo*, that Ilic was treated less favorably than other employees at Liquid Air, there is absolutely no evidence to support the inference that Ilic was singled out for this unfair treatment because of his religion or national origin.

IV. CONCLUSIONS AND RECOMMENDATION

Ilic has not proven a prima facie case with respect to any of his claims. Accordingly, the undersigned respectfully recommends that judgment be entered for Liquid Air and that this case be dismissed with prejudice.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days of the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Respectfully submitted this 24th day of August, 1993.

s/
DAVID A. BAKER

UNITED STATES MAGISTRATE JUDGE

Copies to:

The Honorable Anne C. Conway
Edward R. Gay, Esq.
Leo P. Rock, Esq.

APPENDIX F - 42 U.S.C. § 2000e-2 & 2000e-3

42 U.S.C. § 2000e-2 & 2000e-3 provides in pertinent part:

Unlawful Employment Practices
42 U.S.C. § 2000e-2

Employer Practices

(a) It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Other Unlawful Employment Practices
42 U.S.C. § 2000e-3

Discrimination for Making Charges, Testifying, Assisting, or Participating in Enforcement Proceedings

(a) It shall be unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

APPENDIX G - EXCERPTS FROM PLAINTIFF'S EXHIBIT NO. 96

KATTEN MUCHIN & ZAVIS

June 6, 1991

Mr. Robert K. Metaxa
Supervisory Investigator
Equal Employment Opportunity
Commission

... As set forth more fully below, Mr. Ilic was not promoted to the Manager or Assistant Manager positions referred to in his Charge because he never indicated an interest in being promoted to these positions.

On April 3, 1990, Ilic told several of his co-workers that he was carrying a gun. Ilic was advised on that same date that carrying or possessing a firearm on Company property or in a Company vehicle is a violation of Company policy and that he should cease from doing so.

Very truly yours,

Brian W. Bulger
Colette M. Foissotte

Attorneys for Liquid Air Corporation

APPENDIX H - EXCERPTS FROM PLAINTIFF'S EXHIBIT NO. 97

KATTEN MUCHIN & ZAVIS

June 6, 1991

Mr. Robert K. Metaxa
Supervisory Investigator
Equal Employment Opportunity Commission

... Also, please be aware that Liquid Air considers this position statement confidential and does not consent to

the use or admission of the statements made herein as evidence in any administrative or other proceeding.

... As set forth more fully below, Mr. Ilic was not promoted to the Manager or Assistant Manager positions referred to in his Charge because he never indicated an interest in being promoted to these positions.

In late March 1990, the Company discovered that Ilic was carrying a gun on his person while at work. Ilic was advised on April 3, 1990 that carrying or possessing a firearm on Company property or in a Company vehicle is a violation of Company policy and that a violation of this policy would result in immediate discharge.

Very truly yours,

s/
Brian W. Bulger
Colette M. Foissotte

Attorneys for Liquid Air Corporation

APPENDIX I - EXCERPTS FROM PLAINTIFF'S EXHIBIT NO. 129

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ZARKO ILIC,

Plaintiff,

vs. CASE NO. 92-199-CIV-ORL-20

LIQUID AIR CORPORATION,

Defendant.

NOTICE OF SERVICE OF LIQUID AIR CORPORATION'S RESPONSES TO ZARKO ILIC'S SECOND INTERROGATORIES

... 10. In relation to the statement made by Brian W. Bulger and Colette M. Foissotte, Attorneys for Liquid Air Corporation, in a latter to EEOC on June, 1991, "In late March 1990, the Company discovered that Ilic was carrying a gun on his person while at work." Who was person that discovered gun on Zarko Ilic? Did that person search Zarko Ilic? Why Liquid Air did not terminate Zarko Ilic after that discovery?

ANSWER:

Liquid Air understands that one or more drivers have stated that Ilic was carrying a gun on his person while at work. Liquid Air does not know the identity of such driver or drivers and does not know if he or they searched Ilic. Liquid Air considered the circumstances and Ilic's statements and decided to call Ilic's attention to Liquid Air's long-standing firearms policy. After making a reasonable inquiry, Liquid Air has determined that the

information known or readily obtainable by it is insufficient to enable Liquid Air to more fully respond to this Interrogatory.

APPENDIX J - EXCERPTS FROM PLAINTIFF'S EXHIBIT NO. 26

LIQUID AIR
AN AIR LIQUIDE GROUP COMPANY

May 8, 1990

All of the mistakes discovered by the FDA were attributed to your omission of the required information on the required forms.

... If this attitude affects your compliance with Company policy and procedures, ...

Bruno Fraeyman

APPENDIX K - EXCERPTS FROM PLAINTIFF'S EXHIBIT NO. 27

Deprtment of Health and Human Services
Public Health Service
Food and Drug Administration

4/24/90

1. There are no written procedures for production and process control. The lack of written procedures and records was determined by asking Mr. Robert W. Ferguson for the procedures or records and he replied that there were none that he could find.

2. A review of the firm's analytical records revealed that some oxygen and nitrogen analytical records do not have the initials or signature showing that the original records have been reviewed for accuracy and/or completeness by a second person.

... He stated that he would contact corporate headquarters the following day to obtain written procedures for production and process control.

APPENDIX L - EXCERPTS FROM TRIAL TESTIMONY OF BRUNO FRAEYMAN

Q. Let me show you what has been marked as Exhibit 26. Can you identify Exhibit Number 26, please?

A. Yes. It's a written warning letter.

Q. And this is about an FDA form?

A. Yes.

Q. It appears that you're blaming Mr. Ilic for a lack of procedures at the plant; is that right?

A. Yes, that's right.

[1] The elements of this test are flexible and can be adapted to fit the requirements of a particular type of case, whether the plaintiff alleges a discriminatory failure to hire, failure to promote, or discriminatory discharge. *McDonnell Douglas*, 411 U.S. at 802 n.13; *Perryman v. Johnson Products Co., Inc.*, 698 F.2d 1138, 1141 (11th Cir. 1983).

Supreme Court, U.S.
FILED
MAR 1 3 1995
OFFICE OF THE CLERK

No. 94-1376

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

ZARKO ILIC,

Petitioner,

v.

LIQUID AIR CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LEO P. ROCK, JR.
Counsel of Record
SUSAN T. SPRADLEY
GRAY, HARRIS & ROBINSON, P.A.
Attorneys for Respondent
201 East Pine Street, Suite 1200
P.O. Box 3068
Orlando, Florida 32802
(407) 843-8880

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the unpublished court of appeals decision below that simply finds ample evidentiary support for factual findings that are not clearly erroneous and that the correct rules of law were applied by the trial court can be in conflict with another court of appeals decision when Petitioner has not cited such a court of appeals decision.

2. Whether this Court's power of supervision needs to be exercised when Petitioner has not shown any United States court of appeals departure or sanctioned United States district court departure from the accepted and usual course of judicial proceedings and Petitioner is objecting to the weight not given to his evidence or argument below.

LIST OF PARTIES

Zarko Ilic - Plaintiff/Petitioner

Liquid Air Corporation - Defendant/Respondent merged into Air Liquide America Corporation, a Delaware domestic corporation.

AL America Holdings, Inc.[1] - Parent of Defendant/Respondent, also a Delaware domestic corporation

[1]Both Air Liquide America Corporation and AL America Holdings, Inc. are privately held, with no shares issues to the public.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED . . . . . *i*

LIST OF PARTIES . . . . . *ii*

TABLE OF CONTENTS . . . . . *iii*

TABLE OF AUTHORITIES . . . . . *iv*

SUMMARY OF ARGUMENT 1

ARGUMENT - REASONS FOR DENYING WRIT OF CERTIORARI 2

I. Petitioner Has Not Established A Conflict In U.S. Circuit Court of Appeals Decisions Or Misapplication Of A Prior Decision Of This Court 2

II. This Court's Supervisory Authority Over Lower Federal Courts Should Not Be Exercised When Petitioner Is Arguing Evidentiary Issues 6

CONCLUSION 11

SUMMARY OF ARGUMENT

Petitioner has not provided any U.S. court of appeals decision from another circuit that conflicts with the decision below. Nor has the Petitioner shown misapplication of a prior decision of this Court by the courts below.

Petitioner incorrectly asks this Court to exercise its supervisory authority over the federal courts below where Petitioner's concern is over how his evidence and arguments were treated below.

ARGUMENT

REASONS FOR DENYING WRIT OF CERTIORARI

I. Petitioner Has Not Established A Conflict In U.S. Circuit Court of Appeals Decisions Or Misapplication Of A Prior Decision Of This Court.

U.S. Supreme Court Rule 10.1(a) provides that one reason for review on writ of certiorari is where the United States court of appeals decision is in conflict with a decision of another United States court of appeals on the same matter. This is a principal purpose for the Court's use of certiorari jurisdiction on issues of law. Braxton v. U.S., 500 U.S. 344, 111 S. Ct. 1854, 1857, 114 L. Ed. 2d 385, 391 (1990).

Petitioner does not, however, provide any conflicting court of appeals decision on the same matter. The only case cited by Petitioner that was not an Eleventh Circuit case when decided is Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970)[2], which holds that the statute of limitations for filing a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) does not bar a later allegation of national origin discrimination in an amended charge which related back and grew out of the factual allegations in the timely sex discrimination charge.

---

[2]When Sanchez was decided the Eleventh Circuit had not been established. The Eleventh Circuit has adopted and considered itself bound by all Fifth Circuit cases handed down prior to October 1, 1981. This includes Sanchez as law of the Eleventh Circuit. SEC v. Carriba Air, Inc., 681 F.2d 1318, 1324 n.7 (11th Cir. 1982).

The Sanchez court also held that a judicial complaint can contain allegations on matters developed in the EEOC's investigation of the charge. 431 F.2d at 466. Neither of these issues are present in this case. There is no conflict, even if Sanchez is considered to be a decision of another court of appeals.[3]

In the alleged conflict portion of the Petition, Petitioner argues an inconsistent application of Lewis v. Smith, 731 F.2d 1535 (11th Cir. 1984) (Petition, Reason II, page 8). Lewis is an Eleventh Circuit case and not a decision of another court of appeals. Petitioner also cites Lewis in his Question Presented No. 4, claiming that the district court failed to state what standard of proof was applied on the promotion issue. The U.S. Magistrate Judge, however, did state the applicable legal standard under decisions of this Court and that Plaintiff/Petitioner had the "burden of proving a prima facie case by a preponderance of the evidence." (Petition, Appendix E, page 9a)[4] The U.S. District Court adopted and confirmed the U.S. Magistrate Judge's Report and Recommendation (Petition, Appendix C).[5]

---

[3]The underlying unpublished appellate decision does not state a principle of law with which there could actually be a conflict. (Petition, Appendix B, page 2a. A typographical error appears as "low" instead of "law" on page 3a.)

[4]Petitioner's Appendix E, page 9a, reflects footnote 1 in the U.S. Magistrate Judge's Report and Recommendation; however, the footnote and its text appear at page 23a.

[5]Typographical error in Appendix C, should read "law" instead of "low", page 4a.

Even if Lewis was a decision of another circuit, there is no conflict. Lewis rejected a "clear and convincing" standard in favor of a "preponderance" standard that was used here. Lewis, 731 F.2d at 1539. The Lewis court found liability and the remand was "for the fashioning of an appropriate remedy." Lewis, 731 F.2d at 1539, 1540. Petitioner's Question No. 4 does not present a reason for granting the writ.

Petitioner's Question No. 1 and Reason No. 1 For Granting Writ (Petition, pages ii, 4 and 5) claim the existence of an important and unanswered question and a conflict with a prior decision of this Court. Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988).

Petitioner claims that "the District Court had erred in failing to apply 'disparate impact' analysis to his claims of discrimination in promotion." (Petition, page 5) Petitioner has a misconception of the law here. This Court decided that a "disparate impact analysis may in principal be applied to subjective as well as to objective practices" (emphasis supplied). Watson, 487 U.S. at 991, 108 S. Ct. at 2787, 101 L. Ed. 2d at 843. This is a permissive, not mandatory analysis.

In Watson, this Court also noted that it had "consistently used conventional disparate treatment theory, in which proof of intent to discriminate is required, to review hiring and promotion decisions that were based on the exercise of personal judgment or the application of inherently subjective criteria." Watson, 487 U.S. at 988, 108 S. Ct. at 2785, 101 L. Ed. 2d at 841. Disparate treatment theory was applied here. (Petition, Appendix E, pages 8a-10a).

Petitioner's reliance on Watson is also misplaced in fact and law because he failed to "offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for ... promotions because of their membership in a protected group." Watson, 487 U.S. at 994, 108 S. Ct. at 2789, 101 L. Ed. 2d at 845. This is not a class action case. Petitioner is concerned with the lack of his promotion. (Petition, pages 10-14). The U.S. Magistrate Judge found that he alleged discrimination against him "by not promoting him to two management level positions" (Petition, Appendix E, page 10a).

This Court in Watson acknowledged the legitimate relevance of subjective criteria for measuring an employee's qualities of "common sense, good judgment, originality, ambition, loyalty, and tact" and that evaluative opinions of managers are not susceptible to direct or objective measurement "for many jobs that involve close cooperation with one's co workers." Watson, 487 U.S. at 991, 108 S. Ct. at 2787, 101 L. Ed. 2d at 843. This relates to the employer's defense in a disparate impact case of business necessity and job relatedness for job requirements. Watson, 487 U.S.at 997, 108 S. Ct. at 2790, 101 L. Ed. 2d at 847.

The U.S. Magistrate Judge, in discussing the employer's promotion policy of promoting from within based on seniority if other facts are equal, concluded that "Given the attitude that Mr. Ilic had displayed, Liquid Air was well within its rights to decide that Ilic was not qualified to manage the plant and to chose Bostian and Thompson over Ilic." (Petition, Appendix E, page 14a).

Other findings by the U.S. Magistrate Judge on Petitioner's attitude in his Report and Recommendation include Petitioner's "repeated challenges to and confrontations with management and other employees regarding various aspects of plant operations" (Petition, Appendix E, page 11a); he manifested "an attitude that management could properly conclude made Ilic an unproductive employee requiring reprimands and discipline" (Petition, Appendix E, pages 12a and 13a); "made sarcastic responses to offered overtime" and that "management was well within its rights to conclude that this displayed an attitude not conducive to harmony and good production" (Petition, Appendix E, page 13a); and that his "challenges to authority were frequent and disruptive" (Petition, Appendix E, pages 15a and 16a).

Thus, even under this Court's Watson disparate impact analysis with the appropriate employer defense of manifest job relatedness requirements there were factual findings by the lower court that Petitioner was not deserving of promotion.

II. This Court's Supervisory Authority Over Lower Federal Courts Should Not Be Exercised When Petitioner Is Arguing Evidentiary Issues.

This case does not present a special and important reason for the Court's supervisory authority review because the Eleventh Circuit neither departed nor sanctioned District Court departure from the accepted and usual course of judicial proceedings.

Petitioner claims a departure in his Petition. Reason No. III, pages 10 - 14 of Petition. However, a reading of

that portion of the Petition shows that Petitioner is just rearguing the weight he feels that should have been given to his evidence and his arguments on that evidence. Petitioner disputes his lack of being promoted.

The writ should not be granted "merely to review the evidence or inferences drawn from it." General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 178, 58 S. Ct. 849, 851, 82 L. Ed. 1273, 1275 (1938); adhered to 305 U.S. 124, 59 S. Ct. 116, 83 L. Ed. 81, reh'g denied, 305 U.S. 615, 59 S. Ct. 355, 83 L. Ed. 437 (1939).

This Court's certiorari jurisdiction should not be invoked to review evidentiary conflicts. N.L.R.B. v. Pittsburg Steamship Co., 340 U.S. 498, 503, 71 S. Ct. 453, 456, 95 L. Ed. 479, 482 (1951). Factual questions are for the trial court to resolve. J. I. Case Company v. Borak, 377 U.S. 426, 431, 84 S. Ct. 1555, 1559, 12 L. Ed. 2d 423, 427 (1964). See also Ferguson v. Moore-McCormick Lines, Inc., 352 U.S. 521, 528, 77 S. Ct. 459, 461, 1 L. Ed. 2d 515, 522 (1957), Frankfurter, J., dissenting (certiorari not proper when only thing in controversy is an appraisal of facts on which [the Supreme] Court is being asked to make a second guess, to substitute its assessment of the testimony for that of the court below.")

The Magistrate Judge concluded that, "Given the attitude that Mr. Ilic had displayed, Liquid Air was well within its rights to decide that Ilic was not qualified to manage the plant and to chose Bostian and Thompson over Ilic." (Petition, Appendix E, page 14a). The Magistrate Judge went on to find that, "Ilic has not proven that he was qualified for the promotions in question and thus has not established a prima facie case of discrimination with regard

to this failure to promote claim" (Petition, Appendix E, page 15a).

Petitioner's Questions Presented Numbers 2, 3 and 5 also raise evidentiary issues which are not for this Court to review on certiorari. General Talking Pictures Corp. v. Western Electric Co., supra.

Question No. 2 deals with Petitioner's completion of an EEOC questionnaire in which he admitted that he was "very outspoken" (Petition, page 6). This and other evidence supported the U.S. Magistrate Judge's conclusion of Petitioner's "...repeated challenges to and confrontations with management and other employees regarding various aspects of plant operations." (Petition, Appendix E, page 11a); that Petitioner "displayed an attitude not conducive to harmony and good production" (Id. at page 13a); that Petitioner's "challenges to authority were frequent and disruptive." (Id. at page 16a) Petitioner's reliance on Antonopulos v. Curojet-General Corp., 295 F. Supp. 1390 (E.D. Cal. 1968) is misplaced because that case dealt with equitable estoppel concerns at the motion to dismiss stage and timely filing of a charge by pro se plaintiffs. That issue is not in this case and Petitioner's self alleged errors were "corrected by EEOC in (his) official charge of discrimination" (Petition, page 6).

Nor is Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970) applicable to this case as it also dealt with reversal of an order dismissing a complaint for overly technical reasons when the U.S. District Court disallowed a relation back amendment to the charge.

Petitioner's Question No. 3 contains Petitioner's misunderstanding of what constitutes direct evidence of

discriminatory intent. There is no evidence that management acted or said it refused to promote, disciplined, or assigned overtime because Petitioner was Yugoslavian or he practiced the Eastern Orthodox religion which would have correlated to his complaint. See Caban-Wheeler v. Elsea, 904 F.2d 1549, 1555 (11th Cir. 1990).

Petitioner's cited authority in his Question No. 3 are Eleventh Circuit cases that do not reflect any conflict with other circuits, but go to the weight of his evidence which is not set forth in his Petition where these cases are cited (Petition, pages 7 and 8). The Eleventh Circuit denied rehearing and Petitioner's Suggestion of Rehearing En Banc (Petition, Appendix A, page 1a).

Petitioner's Question No. 5 raises Petitioner's allegations of fabricated memos and his argument references testimony by his two document expert witnesses (Petition, page 9) without inclusion of the documents or testimony, in Petitioner's Appendix. Had this been included it would further demonstrate Petitioner's efforts to have this Court review the evidence.[6]

Special and important reasons for this Court's review in the exercise of its supervisory power over the lower federal courts were found if a jury trial was denied. Rogers v. Missouri Pacific R.R. Co., 352 U.S. 500, 509, 77 S. Ct. 443, 450, 1 L. Ed. 2d 493, 501, reh'g denied, 353

---

[6]Respondent has chosen not to append the documents or relevant trial testimony on this evidentiary issue because that would only compound the error of presenting this Court with evidentiary issues that were properly resolved at the trial stage, J. I. Case Company v. Borak, supra. This is not a basis for certiorari jurisdiction.

U.S. 943, 77 S. Ct. 808, 1 L. Ed. 2d 764 (1957). This power was also discussed on the issue of waiver of self-incrimination constitutional privilege in a civil case where criminal contempt was imposed. Brown v. U.S., 356 U.S. 148, 161, 78 S. Ct. 622, 630, 2 L. Ed. 2d 589, 600, J. Brennan, dissent, reh'g denied, 356 U.S. 948, 78 S. Ct. 776, 2 L. Ed. 2d 822 (1958). Failure to assess statutory issues before constitutional issues necessitated review in New York Transit Authority v. Beazer, 440 U.S. 568, 582, 99 S. Ct. 1355, 1364, 59 L. Ed. 2d 587, 600 (1979). Similar compelling reasons of constitutional significance for the grant of the writ do not exist here to justify review under Supreme Court Rule 10.1(a).

CONCLUSION

The petition for writ of certiorari should be denied because it fails to provide any basis[7] for United States Supreme Court review of the Eleventh Circuit decision below.

Respectfully submitted,

LEO P. ROCK, JR.
(Counsel of Record)
SUSAN T. SPRADLEY
GRAY, HARRIS & ROBINSON, P.A.
201 East Pine St., Suite 1200
P.O. Box 3068
Orlando, Florida 32802
(407) 843-8880

Attorneys for Respondent

---

[7]Petition has provided five questions and three reasons for review (Petition, pages i and ii) which Respondent has opposed and treated:

Petitioner Question	Respondent's Brief
No. 1	Page 4-6
No. 2	Page 8
No. 3	Page 8, 9
No. 4	Page 3, 4
No. 5	Page 9

Petitioner Reason	Respondent's Brief
I	Page 4-6
II	Page 3, 4
III	Page 6-8

FILED
MAR 15 1995
OFFICE OF THE CLERK

No. 94-1376

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

ZARKO ILIC,

Petitioner,

v.

LIQUID AIR CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LEO P. ROCK, JR.
Counsel of Record
SUSAN T. SPRADLEY
GRAY, HARRIS & ROBINSON, P.A.
Attorneys for Respondent
201 East Pine Street, Suite 1200
P.O. Box 3068
Orlando, Florida 32802
(407) 843-8880

QUESTIONS PRESENTED

1. Whether the unpublished court of appeals decision below that simply finds ample evidentiary support for factual findings that are not clearly erroneous and that the correct rules of law were applied by the trial court can be in conflict with another court of appeals decision when Petitioner has not cited such a court of appeals decision.

2. Whether this Court's power of supervision needs to be exercised when Petitioner has not shown any United States court of appeals departure or sanctioned United States district court departure from the accepted and usual course of judicial proceedings and Petitioner is objecting to the weight not given to his evidence or argument below.

LIST OF PARTIES

Zarko Ilic - Plaintiff/Petitioner

Liquid Air Corporation - Defendant/Respondent merged into Air Liquide America Corporation, a Delaware domestic corporation.

AL America Holdings, Inc.[1] - Parent of Defendant/Respondent, also a Delaware domestic corporation

[1]Both Air Liquide America Corporation and AL America Holdings, Inc. are privately held, with no shares issues to the public.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	*i*
LIST OF PARTIES	*ii*
TABLE OF CONTENTS	*iii*
TABLE OF AUTHORITIES	*iv*
SUMMARY OF ARGUMENT	1
ARGUMENT - REASONS FOR DENYING WRIT OF CERTIORARI	2
I. Petitioner Has Not Established A Conflict In U.S. Circuit Court of Appeals Decisions Or Misapplication Of A Prior Decision Of This Court	2
II. This Court's Supervisory Authority Over Lower Federal Courts Should Not Be Exercised When Petitioner Is Arguing Evidentiary Issues	6
CONCLUSION	11

TABLE OF AUTHORITIES

Page

Cases Cited:

Antonopulos v. Curojet-General Corp., 295 F. Supp. 1390 (E.D. Cal. 1968) 8

Braxton v. U.S., 500 U.S. 344, 111 S. Ct. 1854, 114 L. Ed. 2d 385 (1990) 2

Brown v. U.S., 356 U.S. 148, 78 S. Ct. 622, 2 L. Ed. 2d 589, reh'g denied, 356 U.S. 948, 78 S. Ct. 776, 2 L. Ed. 2d 822 (1958) 10

Caban-Wheeler v. Elsea, 904 F.2d 1549 (11th Cir. 1990) 9

Ferguson v. Moore-McCormick Lines, Inc., 352 U.S. 521, 77 S. Ct. 459, 1 L. Ed. 2d 515 (1957) 7

General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 58 S. Ct. 849, 82 L. Ed. 1273 (1938) 7, 8

J. I. Case Company v. Borak, 377 U.S. 426, 84 S. Ct. 1555, 12 L. Ed. 2d 423 (1964) 7, 9

Lewis v. Smith, 731 F.2d 1535 (11th Cir. 1984) 3, 4

N.L.R.B. v. Pittsburg Steamship Co., 340 U.S. 498, 71 S. Ct. 453, 95 L. Ed. 479 (1951) 7

TABLE OF AUTHORITIES - Continued

Page

New York Transit Authority v. Beazer, 440 U.S. 568, 99 S. Ct. 1355, 59 L. Ed. 2d 587 (1979) 10

Rogers v. Missouri Pacific R.R. Co., 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 reh'g denied, 353 U.S. 943, 77 S. Ct. 808, 1 L. Ed. 2d 764 (1957) . . 9

SEC v. Carriba Air, Inc., 681 F.2d 1318 (11th Cir. 1982) 2

Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970) 2, 3, 8

Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988) 4, 5, 6

Rule Cited:

U.S. Supreme Court Rule 10.1(a) 2, 10

SUMMARY OF ARGUMENT

Petitioner has not provided any U.S. court of appeals decision from another circuit that conflicts with the decision below. Nor has the Petitioner shown misapplication of a prior decision of this Court by the courts below.

Petitioner incorrectly asks this Court to exercise its supervisory authority over the federal courts below where Petitioner's concern is over how his evidence and arguments were treated below.

ARGUMENT

REASONS FOR DENYING WRIT OF CERTIORARI

I. Petitioner Has Not Established A Conflict In U.S. Circuit Court of Appeals Decisions Or Misapplication Of A Prior Decision Of This Court.

U.S. Supreme Court Rule 10.1(a) provides that one reason for review on writ of certiorari is where the United States court of appeals decision is in conflict with a decision of another United States court of appeals on the same matter. This is a principal purpose for the Court's use of certiorari jurisdiction on issues of law. Braxton v. U.S., 500 U.S. 344, 111 S. Ct. 1854, 1857, 114 L. Ed. 2d 385, 391 (1990).

Petitioner does not, however, provide any conflicting court of appeals decision on the same matter. The only case cited by Petitioner that was not an Eleventh Circuit case when decided is Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970)[2], which holds that the statute of limitations for filing a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) does not bar a later allegation of national origin discrimination in an amended charge which related back and grew out of the factual allegations in the timely sex discrimination charge.

---

[2]When Sanchez was decided the Eleventh Circuit had not been established. The Eleventh Circuit has adopted and considered itself bound by all Fifth Circuit cases handed down prior to October 1, 1981. This includes Sanchez as law of the Eleventh Circuit. SEC v. Carriba Air, Inc., 681 F.2d 1318, 1324 n.7 (11th Cir. 1982).

The Sanchez court also held that a judicial complaint can contain allegations on matters developed in the EEOC's investigation of the charge. 431 F.2d at 466. Neither of these issues are present in this case. There is no conflict, even if Sanchez is considered to be a decision of another court of appeals.[3]

In the alleged conflict portion of the Petition, Petitioner argues an inconsistent application of Lewis v. Smith, 731 F.2d 1535 (11th Cir. 1984) (Petition, Reason II, page 8). Lewis is an Eleventh Circuit case and not a decision of another court of appeals. Petitioner also cites Lewis in his Question Presented No. 4, claiming that the district court failed to state what standard of proof was applied on the promotion issue. The U.S. Magistrate Judge, however, did state the applicable legal standard under decisions of this Court and that Plaintiff/Petitioner had the "burden of proving a prima facie case by a preponderance of the evidence." (Petition, Appendix E, page 9a)[4] The U.S. District Court adopted and confirmed the U.S. Magistrate Judge's Report and Recommendation (Petition, Appendix C).[5]

---

[3]The underlying unpublished appellate decision does not state a principle of law with which there could actually be a conflict. (Petition, Appendix B, page 2a. A typographical error appears as "low" instead of "law" on page 3a.)

[4]Petitioner's Appendix E, page 9a, reflects footnote 1 in the U.S. Magistrate Judge's Report and Recommendation; however, the footnote and its text appear at page 23a.

[5]Typographical error in Appendix C, should read "law" instead of "low", page 4a.

Even if Lewis was a decision of another circuit, there is no conflict. Lewis rejected a "clear and convincing" standard in favor of a "preponderance" standard that was used here. Lewis, 731 F.2d at 1539. The Lewis court found liability and the remand was "for the fashioning of an appropriate remedy." Lewis, 731 F.2d at 1539, 1540. Petitioner's Question No. 4 does not present a reason for granting the writ.

Petitioner's Question No. 1 and Reason No. 1 For Granting Writ (Petition, pages ii, 4 and 5) claim the existence of an important and unanswered question and a conflict with a prior decision of this Court. Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988).

Petitioner claims that "the District Court had erred in failing to apply 'disparate impact' analysis to his claims of discrimination in promotion." (Petition, page 5) Petitioner has a misconception of the law here. This Court decided that a "disparate impact analysis may in principal be applied to subjective as well as to objective practices" (emphasis supplied). Watson, 487 U.S. at 991, 108 S. Ct. at 2787, 101 L. Ed. 2d at 843. This is a permissive, not mandatory analysis.

In Watson, this Court also noted that it had "consistently used conventional disparate treatment theory, in which proof of intent to discriminate is required, to review hiring and promotion decisions that were based on the exercise of personal judgment or the application of inherently subjective criteria." Watson, 487 U.S. at 988, 108 S. Ct. at 2785, 101 L. Ed. 2d at 841. Disparate treatment theory was applied here. (Petition, Appendix E, pages 8a-10a).

Petitioner's reliance on Watson is also misplaced in fact and law because he failed to "offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for ... promotions because of their membership in a protected group." Watson, 487 U.S. at 994, 108 S. Ct. at 2789, 101 L. Ed. 2d at 845. This is not a class action case. Petitioner is concerned with the lack of his promotion. (Petition, pages 10-14). The U.S. Magistrate Judge found that he alleged discrimination against him "by not promoting him to two management level positions" (Petition, Appendix E, page 10a).

This Court in Watson acknowledged the legitimate relevance of subjective criteria for measuring an employee's qualities of "common sense, good judgment, originality, ambition, loyalty, and tact" and that evaluative opinions of managers are not susceptible to direct or objective measurement "for many jobs that involve close cooperation with one's co workers." Watson, 487 U.S. at 991, 108 S. Ct. at 2787, 101 L. Ed. 2d at 843. This relates to the employer's defense in a disparate impact case of business necessity and job relatedness for job requirements. Watson, 487 U.S.at 997, 108 S. Ct. at 2790, 101 L. Ed. 2d at 847.

The U.S. Magistrate Judge, in discussing the employer's promotion policy of promoting from within based on seniority if other facts are equal, concluded that "Given the attitude that Mr. Ilic had displayed, Liquid Air was well within its rights to decide that Ilic was not qualified to manage the plant and to chose Bostian and Thompson over Ilic." (Petition, Appendix E, page 14a).

Other findings by the U.S. Magistrate Judge on Petitioner's attitude in his Report and Recommendation include Petitioner's "repeated challenges to and confrontations with management and other employees regarding various aspects of plant operations" (Petition, Appendix E, page 11a); he manifested "an attitude that management could properly conclude made Ilic an unproductive employee requiring reprimands and discipline" (Petition, Appendix E, pages 12a and 13a); "made sarcastic responses to offered overtime" and that "management was well within its rights to conclude that this displayed an attitude not conducive to harmony and good production" (Petition, Appendix E, page 13a); and that his "challenges to authority were frequent and disruptive" (Petition, Appendix E, pages 15a and 16a).

Thus, even under this Court's Watson disparate impact analysis with the appropriate employer defense of manifest job relatedness requirements there were factual findings by the lower court that Petitioner was not deserving of promotion.

II. This Court's Supervisory Authority Over Lower Federal Courts Should Not Be Exercised When Petitioner Is Arguing Evidentiary Issues.

This case does not present a special and important reason for the Court's supervisory authority review because the Eleventh Circuit neither departed nor sanctioned District Court departure from the accepted and usual course of judicial proceedings.

Petitioner claims a departure in his Petition. Reason No. III, pages 10 - 14 of Petition. However, a reading of

that portion of the Petition shows that Petitioner is just rearguing the weight he feels that should have been given to his evidence and his arguments on that evidence. Petitioner disputes his lack of being promoted.

The writ should not be granted "merely to review the evidence or inferences drawn from it." General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 178, 58 S. Ct. 849, 851, 82 L. Ed. 1273, 1275 (1938); adhered to 305 U.S. 124, 59 S. Ct. 116, 83 L. Ed. 81, reh'g denied, 305 U.S. 615, 59 S. Ct. 355, 83 L. Ed. 437 (1939).

This Court's certiorari jurisdiction should not be invoked to review evidentiary conflicts. N.L.R.B. v. Pittsburg Steamship Co., 340 U.S. 498, 503, 71 S. Ct. 453, 456, 95 L. Ed. 479, 482 (1951). Factual questions are for the trial court to resolve. J. I. Case Company v. Borak, 377 U.S. 426, 431, 84 S. Ct. 1555, 1559, 12 L. Ed. 2d 423, 427 (1964). See also Ferguson v. Moore-McCormick Lines, Inc., 352 U.S. 521, 528, 77 S. Ct. 459, 461, 1 L. Ed. 2d 515, 522 (1957), Frankfurter, J., dissenting (certiorari not proper when only thing in controversy is an appraisal of facts on which [the Supreme] Court is being asked to make a second guess, to substitute its assessment of the testimony for that of the court below.")

The Magistrate Judge concluded that, "Given the attitude that Mr. Ilic had displayed, Liquid Air was well within its rights to decide that Ilic was not qualified to manage the plant and to chose Bostian and Thompson over Ilic." (Petition, Appendix E, page 14a). The Magistrate Judge went on to find that, "Ilic has not proven that he was qualified for the promotions in question and thus has not established a prima facie case of discrimination with regard

to this failure to promote claim" (Petition, Appendix E, page 15a).

Petitioner's Questions Presented Numbers 2, 3 and 5 also raise evidentiary issues which are not for this Court to review on certiorari. General Talking Pictures Corp. v. Western Electric Co., supra.

Question No. 2 deals with Petitioner's completion of an EEOC questionnaire in which he admitted that he was "very outspoken" (Petition, page 6). This and other evidence supported the U.S. Magistrate Judge's conclusion of Petitioner's "...repeated challenges to and confrontations with management and other employees regarding various aspects of plant operations." (Petition, Appendix E, page 11a); that Petitioner "displayed an attitude not conducive to harmony and good production" (Id. at page 13a); that Petitioner's "challenges to authority were frequent and disruptive." (Id. at page 16a) Petitioner's reliance on Antonopulos v. Curojet-General Corp., 295 F. Supp. 1390 (E.D. Cal. 1968) is misplaced because that case dealt with equitable estoppel concerns at the motion to dismiss stage and timely filing of a charge by pro se plaintiffs. That issue is not in this case and Petitioner's self alleged errors were "corrected by EEOC in (his) official charge of discrimination" (Petition, page 6).

Nor is Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970) applicable to this case as it also dealt with reversal of an order dismissing a complaint for overly technical reasons when the U.S. District Court disallowed a relation back amendment to the charge.

Petitioner's Question No. 3 contains Petitioner's misunderstanding of what constitutes direct evidence of

discriminatory intent. There is no evidence that management acted or said it refused to promote, disciplined, or assigned overtime because Petitioner was Yugoslavian or he practiced the Eastern Orthodox religion which would have correlated to his complaint. See Caban-Wheeler v. Elsea, 904 F.2d 1549, 1555 (11th Cir. 1990).

Petitioner's cited authority in his Question No. 3 are Eleventh Circuit cases that do not reflect any conflict with other circuits, but go to the weight of his evidence which is not set forth in his Petition where these cases are cited (Petition, pages 7 and 8). The Eleventh Circuit denied rehearing and Petitioner's Suggestion of Rehearing En Banc (Petition, Appendix A, page 1a).

Petitioner's Question No. 5 raises Petitioner's allegations of fabricated memos and his argument references testimony by his two document expert witnesses (Petition, page 9) without inclusion of the documents or testimony, in Petitioner's Appendix. Had this been included it would further demonstrate Petitioner's efforts to have this Court review the evidence.[6]

Special and important reasons for this Court's review in the exercise of its supervisory power over the lower federal courts were found if a jury trial was denied. Rogers v. Missouri Pacific R.R. Co., 352 U.S. 500, 509, 77 S. Ct. 443, 450, 1 L. Ed. 2d 493, 501, reh'g denied, 353

---

[6]Respondent has chosen not to append the documents or relevant trial testimony on this evidentiary issue because that would only compound the error of presenting this Court with evidentiary issues that were properly resolved at the trial stage, J. I. Case Company v. Borak, supra. This is not a basis for certiorari jurisdiction.

U.S. 943, 77 S. Ct. 808, 1 L. Ed. 2d 764 (1957). This power was also discussed on the issue of waiver of self-incrimination constitutional privilege in a civil case where criminal contempt was imposed. Brown v. U.S., 356 U.S. 148, 161, 78 S. Ct. 622, 630, 2 L. Ed. 2d 589, 600, J. Brennan, dissent, reh'g denied, 356 U.S. 948, 78 S. Ct. 776, 2 L. Ed. 2d 822 (1958). Failure to assess statutory issues before constitutional issues necessitated review in New York Transit Authority v. Beazer, 440 U.S. 568, 582, 99 S. Ct. 1355, 1364, 59 L. Ed. 2d 587, 600 (1979). Similar compelling reasons of constitutional significance for the grant of the writ do not exist here to justify review under Supreme Court Rule 10.1(a).

CONCLUSION

The petition for writ of certiorari should be denied because it fails to provide any basis[7] for United States Supreme Court review of the Eleventh Circuit decision below.

Respectfully submitted,

LEO P. ROCK, JR.
(Counsel of Record)
SUSAN T. SPRADLEY
GRAY, HARRIS & ROBINSON, P.A.
201 East Pine St., Suite 1200
P.O. Box 3068
Orlando, Florida 32802
(407) 843-8880

Attorneys for Respondent

---

[7]Petition has provided five questions and three reasons for review (Petition, pages i and ii) which Respondent has opposed and treated:

Petitioner Question	Respondent's Brief
No. 1	Page 4-6
No. 2	Page 8
No. 3	Page 8, 9
No. 4	Page 3, 4
No. 5	Page 9

Petitioner Reason	Respondent's Brief
I	Page 4-6
II	Page 3, 4
III	Page 6-8

No. 94-1376

Supreme Court, U.S.
FILED
MAR 27 1995
OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

ZARKO ILIC,

Petitioner,

vs.

LIQUID AIR CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY BRIEF

ZARKO ILIC, PRO SE
2500 Bay Leaf Dr.
Orlando, Florida 32837
(407) 859-7479

BEST AVAILABLE COPY

23 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

I. The Court Should Grant The Petition To Resolve The Question Whether The Decision By The Eleventh Circuit, That There Is Simply No Merit In Any of The Issues Or Contentions Presented by The Appelant, Is In Conflicts With Supreme Court: Watson V. Fort Worth Bank And Trust, 108 S. Ct. 2777 (1988). 1

II. The Court Should Grant The Petition To Resolve The Question Whether The Decision Of The Eleventh Circuit Is In Conflict With Decision Of Another Circuits And/Or Inconsistent With Precedent Of The Eleventh Circuit. 5

III. The Court Should Grant The Petition To Resolve The Question Whether The Eleventh Circuit Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings, As To Call For An Exercise Of This Court's Power Of Supervision. 15

CONCLUSION 20

TABLE OF CITATIONS

Page

Cases Cited:

Antonopulos v. Aerojet-General Corp.,
E.D. Cal. 1968, 295 F.Supp. 1390 7

Caban-Wheeler v. Elsea,
904 F.2d 1549 (11th Cir. 1990) 8, 9, 15

Katz v. Dole,
709 F.2d 251 (4th Cir. 1983) 14

Lewis v. Smith,
731 F.2d 1535 (11th Cir. 1984) 9, 13

McDonnell-Douglas v. Green,
411 U.S. 792, 93 S.Ct. 1817,
36 L.Ed.2d 668 (1973 ..... 8, 17, 19

Sanchez v. Standard Brands, Inc.,
431 F.2d 455 (5th Cir. 1970) 6

Taylor v. Safeway Stores,
365 F.Supp. 468 (D. Colo. 1973) 14

Thompkins v. Morris Brown College,
752 F.2d 558 (11th Cir. 1985) 8, 9

Watson v. Forth Worth Bank and Trust,
108 S. Ct. 2777 (1988) ..... i, 1

Weiss v. United States,
595 F.Supp. 1050 (1984) 14

PETITIONER'S REPLY BRIEF

Respondent arguments defend the U.S. Magistrate Judge, factual findings that are clearly erroneous, unsupported by the evidence or are contrary to the evidence.

Respondent does not even address any perceived misstatements of fact in Petition, in its Opposition, because there are NONE.

The Court of Appeals grossly misapplied the standard of review by deferring to district court clearly erroneous findings.

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE QUESTION WHETHER THE DECISION BY THE ELEVENTH CIRCUIT, THAT THERE IS SIMPLY NO MERIT IN ANY OF THE ISSUES OR CONTENTIONS PRESENTED BY THE APPELLANT, IS IN CONFLICTS WITH SUPREME COURT: WATSON V. FORT WORTH BANK AND TRUST, 108 S. CT. 2777 (1988).

This Court in Watson state: "We granted certiorari to determine whether the District Court or the Court of

Appeals properly held disparate impact analysis inapplicable to a subjective or discretionary promotion system, and we now hold that such analysis may be applied.

The Eleventh Circuit decision that, there is simply no merit in any of the issues or contentions presented by the appellant should be vacated.

Respondent's argument that this is not a class action case ignore the fact that whether in name or not, the suit is perforce a sort of class action for fellow employees similarly situated. If Ilic obtains vacated decision from this Court he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority.

Respondent argue that the U.S. Magistrate Judge, finding "Given the attitude that Mr. Ilic had displayed ..., that Ilic was not qualified to manage the plant ..." can be used as business necessity defense. (Opp. 5). This finding is clearly erroneous, unsupported by the evidence, contrary to the evidence and bias. This is just a "tip of the ice berg."

Also, the Magistrate Judge made remarks about employer's promotion policy which are inconsistent with

his finding: "THE COURT: Well, the case law says that the company's can better protect themselves if they post those. I mean that's a legitimate, that is not a per se violation not to post notice. It leaves the company open to a charge of discrimination and the case law supports that. ... THE COURT: I think the employer just leaves itself at risk. An adverse inference could be drawn."

Shortly before the trial Respondent began posting notices of openings in salaried job.

First, under disparate impact analysis, Ilic is challenging the legitimacy of the selection system itself. He cannot be required to prove that he qualified for promotions under a system he alleges to be discriminatory unless the legitimacy of that system is first established. Nor can the plaintiff be required to reconstruct a valid selection system and demonstrate that under this system he would have received one or more of the promotions at issue.

Second, let us see some of these facts on the word attitude that Respondent claims as business necessity defense.

a) Position by Respondent was clear an the issue of why Ilic was not promoted. In this letter to EEOC dated

June 6, 1991, two years before trial, Respondent state: "As set forth more fully below, Mr. Ilic was not promoted to the Manager or Assistant Manager positions referred to in his Charge because he never indicated an interest in being promoted to these positions." (Pet. App. H, 20a). NO ATTITUDE HERE.

b) Also, during trial testimony of Mr. Lucht state: Q. Did you consider Zarko Ilic headed for promotion to the plant? A. No, did not. Q. Could you tell us why? A. Nobody ever called to say he wanted it." NO ATTITUDE HERE.

As shown, Ilic was not promoted "because he never indicated an interest" and "Nobody ever called to say he wanted it." and not because of an attitude. And that is why Ilic claim that Magistrate finding is clearly erroneous, unsupported by the evidence, contrary to the evidence and bias.

Respondent is using clearly erroneous, contrary to the evidence finding as business necessity defense.

c) Documentations show that Ilic was in charge during manager's absence for total of four weeks in 1989. Ilic then received a letter which state: "You knowledge of

the process and dedication to duty ... Thanks again for your cooperation." NO ATTITUDE HERE.

d) Letter from Vice President reads: "John McGrew, plant manager has a high opinion of him, he is knowledgeable on plant and computer, has been operator for 20 years and clearly deserve to do something else, for example become assistant plant Mgr or plant Mgr." NO ATTITUDE HERE.

e) Also, testimony of Vice President, Mr. Bruno Fraeyman, that Ilic received bonus for recognizing his efforts in training and that Ilic was giving training to new operators during his time. NO ATTITUDE HERE.

f) And testimony of Mr. Robert Ferguson alleged that he was asked to ask Mr. Ilic if he would be interested in a one-man plaint which is a manager position. NO ATTITUDE HERE.

II. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE QUESTION WHETHER THE DECISION OF THE ELEVENTH CIRCUIT IS IN CONFLICT WITH THE DECISION OF ANOTHER CIRCUITS AND/OR

INCONSISTENT WITH PRECEDENT OF THE ELEVENTH CIRCUIT.

1. Respondent concede that Magistrate, an the issue here that Ilic in filling first questionnaire supplied by the EEOC has written the words "very outspoken", used against Ilic. (Opp. 8). Also, Magistrate finding: "Plaintiff asserted he was being retaliated against even before he filed a claim - a logical impossibility." clearly shows that circling wrong base of discrimination "retaliation" was used against Ilic. (Pet. App. D, 6a).

This shows that Magistrate prejudged issues.

Chief Judge Brown of the Fifth Circuit is clear an this issue. The most elementary principles of justice require us to remove this club and compel a battle on the *merits* of the controversy. Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970).

Not only that Magistrate did not compel a battle on the merits of the controversy but also used double standards.

This questionnaire that was filed by Ilic with EEOC in February 1991, was used against Ilic. The letter dated June 6, 1991 by Respondent filed with EEOC was clear an

its position why Ilic was not promoted, because he never indicated an interest in being promoted, was not used against Respondent. (Pet. App. H, 20a).

And that is a double standard.

Respondent claim that Antonopulos v. Aerojet-General Corp., E.D. Cal. 1968, 295 F.Supp. 1390, 1395 is misplaced. It is clear that Magistrate used this first questionnaire against Ilic and Judge MacBride said it should not be used against plaintiffs:

> We are not dealing with businessmen-plaintiffs or plaintiffs accustomed to consulting lawyers about their rights. This law is a remedial one, and the Congressional purpose would not be furthered by making plaintiffs of the kind with which we are concerned, members of the working class who are generally without substantial higher education, dot every "i" and cross every "t" on their way to the courthouse.

2. Respondent claim that Ilic has misunderstanding of what constitutes direct evidence of discriminatory intent. (Opp. 8).

If Vice President Mr. Fracyman stated: "Ilic if you file charges with EEOC you will be terminated." would that constitute direct evidence of retaliatory intent? Ilic filed charges with EEOC in March 1991 and in June 1991 was

terminated with fabricated facts and without any investigation.

If Ilic was asked to renounce his Eastern Orthodox Christmas for overtime an that day, would that be a direct evidence of a form of "quid pro quo harassment", in which supervisor demands that employee alter or renounce some religious belief in exchange for job benefits?

The issue here is not if Ilic misunderstand what constitutes direct evidence, issue is that district court finding must, as initial matter, specifically state whether or not it believes Ilic's proffered direct evidence of discrimination and/or retaliation and in view of proffer of such direct evidence, it was incorrect of the trial court to apply McDonnell-Douglas test without reference to such evidence. See Thompkins.

Also, the issue is in this case that the Eleventh Circuit is in direct conflict and inconsistent with precedent set in Thompkins v. Morris Brown College, 752 F.2d 558 (11th Cir. 1985) and Caban-Wheeler v. Elsea, 904 F.2d 1549 (11th Cir. 1990).

In Thompkins the Eleventh Circuit state:

> Thus, this case must be remanded to the district court for a determination of whether Threatt and

> Payne made the discriminatory statements. If the district court finds that the statements were made, it must enter judgment for Plaintiff. See Lewis v. Smith, 731 F.2d 1535 (11th Cir. 1984). If the court finds that the statements were not made, it must clearly articulate this finding.

Decision in the instant case, that there is simply no merit in any of the issues or contentions presented by the appellant is inconsistent with Lewis, Thompkins and Caban-Wheeler. The Court should grant the Ilic's petition to resolve the issue.

3. Respondent on this issue of promotion talk about that Magistrate did state the applicable legal standards and that District Court adapted this Report, which is not a issue here. (Opp. 3) It is a common knowledge that District Court "rubber stamp" Magistrate's Reports.

First, Magistrate finding state: "... although there is evidence from which a finder of fact could find a prima facie case to have been established, I find that the Plaintiff has not proven facts that satisfy the, ..." It is clear that this Magistrate is bias and if Ilic had another Magistrate he would have been qualified for promotion. This is another indication that District Court just "rubber stamp" Magistrate Report.

Second, there is another finding inconsistent with first that state: "Ilic has not proven that he was qualified for the promotions in question and thus has not established a prima facie case of discrimination with regard to his failure to promote claim."

This finding is clearly erroneous because, Respondent thought that Ilic was qualified to manage the Plant for four weeks in 1989 and to be offered another management position in 1990. (This Brief 4-5).

Magistrate finding state: "Ilic points to incidents involving Bostian and Thompson which he believes should have disqualified them from promotion consideration." Let see if this Court agree with Ilic.

Incident about Mr. Bostian was described by Mr. Dave Burnett, plant manager in his letter: "After a full and complete investigation ... I am by this letter terminating your employment ... you were observed sleeping on the job." He was reinstated two weeks later and after one year being in Orlando plant he was promoted .

Mr. Thompson was also, in Orlando plant for a year before his promotion.

Incidents of Mr. Thompson were described by:

Testimony of Mr. Perkins on confrontation with secretary: "... it was many yelling and name calling between him and secretary. The doors were closed to the office and there was a lot of yelling, name calling." Confrontation with Mr. Perkins: "Threatened, verbally ... he just shook his finger in my face. ... he was going to stop any lies or rumors going around in any way possible or any means available."

Testimony of Mr. Eller state: "See again, there were three different confrontations and the third one was when there was a plant manager there and he stepped between us (Ferguson) .. Well, he felt there was a need to get between us so - there wouldn't be physical contact. First confrontation, there were threats made that people would be hurt? Or legs broken, or knees broken. Said to you in your face? Right at my face."

Testimony of Mr. Ferguson state: "There was a very heated argument within the control room between Mr. Thompson and Mr. Eller. I stepped in between the two and separated and told them both to leave the office and disperse."

Misconduct with Federal Express driver explained by letter and testimony of Ms. Fawn Clark: "... he was very mad. It was very obvious., ... the Federal Express driver came back in the office in a big hurry, you could tell she was very upset and scared., ... to call in before that man (Charles) hit her., ... He was yelling, screaming, and cursing., ... When he returned he was still raving mad., ... he was tired of the Bullshit., ... Bruce had told me how crazy Charles gets when he is mad, but I have never seen him this bad. ... I was literally shaking, I was so upset." This was three months before Ilic's termination and probably on the day he received charge from EEOC.

As seen in the above paragraphs Magistrate findings that state: "Even if the events occurred as Ilic described them,.. The incidents in question were isolated in nature ..." are clearly erroneous. (Pet. App. E, 14a).

First, in case of Mr. Thompson, events were described by Mr. Perkins, Mr. Eller, Mr. Ferguson and Ms. Clark and in case of Mr. Bostian by Mr. Burnett.

Second, in case of Mr. Thompson the incidents are not isolated in nature but a pattern of behavior.

The Magistrate finding state: "The facts surrounding these incidents are in dispute, but need not be decided here." Where is this going to be decided? The Court should grant the Ilic's petition to resolve the issue.

This is where Lewis come to play. The Magistrate did not explain what objective criteria was used in his finding that Ilic was less qualified then Mr. Bostian and/or Mr. Thompson.

Also, some facts about Mr. Thompson's credibility. A letter by Mr. Lucht raising questions of falsification on employment application; two days after he received charge of discrimination he wrote a memo about Ilic; he admits "Yes, I was incorrect in my memo ...., he stated that he was asked by Mr. Smith to write this memo, Mr. Smith stated that he did not; thirty (30) days before Ilic's termination Mr. Smith testified that report has been made that Mr. Thompson had falsified FDA records. There is more!

And from the fact that there was no investigation by his superiors (testimony of Mr. Smith: Q. "So you didn't attempt to determine whether the facts, what have been alleged to be the facts by Mr. Thompson was true? A. If talking to Mr. Ilic, no. Q. So you solely relied on Mr.

Thompson? A. Yes. ... Q. The termination? A. Yes, solely was Charles. Q. No witnesses? A. No witnesses."; testimony or Mr. Fraeyman: "Q. Was there an investigation that led up to his termination? A. Which investigation?") and fact that Mr. Thompson had motive (if Ilic wins his case with EEOC, Mr. Thompson stand to loose his position) retaliatory intent has been proven.

This is the case where the circumstances of Ilic discharge were such as to promt inquiry into the basis therefor by the assistant manager superiors, and where the superiors failed to investigate and quickly acquiesced in the assistant manager determination that Ilic should be fired. Taylor v. Safeway Stores, 365 F.Supp. 468 (D. Colo. 1973). Also, where the employer's supervisory personnel acquiesced and participated in retaliation, the burden on an employer seeking to avoid Title VII liability is especially heavy. Katz v. Dole, 709 F.2d 251 (4th Cir. 1983), Weiss v. United States, 595 F.Supp. 1050 (1984). Respondent did not carried this burden. The Court should grant the Ilic's petition to resolve the issue.

4. Respondent on the issue of fabricated memos argue that Ilic did not append the documents or relevant

trial testimony. First, Ilic have limited resources, PC with limited RAM and hard drive memory and software that could not do the job. Second, the issue here is that Magistrate finding did not address the issue of fabrication of these five memos and two statements. See Caban-Wheeler.

Decision in the instant case, that there is simply no merit in any of the issues or contentions presented by the appellant is inconsistent with its own precedent.

III. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE QUESTION WHETHER THE ELEVENTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Respondent argue that this case does not present a special and important reason for the Court's supervisory authority review. Ilic will show and the Court will agree that this Court's supervision is needed.

Ilic presented eleven (11) issues an his appeal in a fifty (50) pages brief. As shown in Ilic's Petition and this

Brief, the Eleventh Circuit decision that there is simply no merit in any of the issues or contentions presented by appellant, is a logical impossibility and/or without any common sense.

The officers of the court Mr. Bulger and Ms. Foissotte have with impunity fabricated facts twenty (20) days before Ilic's termination: ... Ilic told several of his co-workers that he was carrying a gun. (Pet. App. G, 19a) ... the Company discovered that Ilic was carrying a gun on his person while at work. (Pet. App. H, 20a). There is more!

First, not only that they are not punished for this but worst of all is that they win the case with EEOC and Respondent win case in the District Court and in the Court of Appeals. Also, there is nothing in Magistrate findings about these proven fabrications.

Second, they state: "Also, please be aware that Liquid Air considers this position statement confidential and does not consent to the use or admission of the statements made herein as evidence in any administrative or other proceeding. (Pet. App. H, 19a). Ilic, pro se, in short understand this as: "We are lying but you can not use these lies against us."

Third, Respondent admits that they used same to terminate Ilic. Testimony of Mr. Smith: "Q. All right. And had the Chicago law firm, to your knowledge, have any involvement or input when the decision was made to terminate Mr. Ilic? A. Yes."

The Magistrate did not address these proven fabricated facts of retaliation. Ilic's claims that the Magistrate failed to consider his claim that defendant's/respondent's rationale was pretextual, thus failing to apply the third prong of the McDonnell-Douglas test.

Also, officer of the court Mr. Rock tried to pass a document as an original, and after testimony of Forensic Document Examiner that this document is a photocopy, with impunity he introduces same photocopy as an original. THE COURT: "Original document?" MR. ROCK: Yes, sir." This is false representation of a document. Not only that this officer of the court was not punished but he wins this case.

Actions of these officers of the court are improper and unethical to say at least.

Ilic has shown that proffered explanation is unworthy of credence is a matter of examining Respondent's vacillations.

Liquid Air understands that one or more drivers have stated that Ilic was carrying a gun on his person while at work. Liquid Air does not know the identity of such driver or drivers and does not know if he or they searched Ilic. (Pat. App. I, 21a).

The Magistrate finding that "Ilic has not established a prima facie case of discriminatory discharge is confusing because he applied the wrong legal standard and inadequately analyzed Ilic's claim of retaliation. (Pet. App. E, 15a). Ilic claimed retaliatory discharge, not discriminatory discharge.

The Magistrate finding: "Further, Ilic has not shown that his national origin or religion had anything to do with the way he was treated regarding the discipline he received, including the incident involving the FDA report." (Pet. App. E, 13a) is clearly erroneous.

Here the Magistrate finding is confusing, he is looking for direct evidence in disparate treatment analysis with circumstantial evidence. Ilic claims that the Magistrate

failed to consider his claim that defendant's/respondent's rationale was pretextual, thus failing to apply the third prong of the McDonnell-Douglas test.

In incident involving the FDA report Ilic proved that "business necessity" defense "attitude" articulated by Respondent was mere pretext for discrimination and/or retaliation.

FDA report state: "There are no written procedures..., analytical records do not have the initials or signature ... He stated that he would contact corporate headquarters the following day to obtain written procedures for production and process control." (Pet. App. K, 22a-23a). In his testimony Mr. Fraeyman admits that he is blaming Ilic for a lack of procedures at the plant. (Pet. App. L, 23a). This has been shown in his letter. (Pet. App. J, 22a). HOW CAN ILIC BE BLAMED AND HAVE "ATTITUDE" FOR SOMETHING THAT DO NOT EXIST AND IS COMPANY RESPONSIBILITY? There is more!

The Eleventh Circuit decision that there is simply no merit in any of the issues or contentions presented by appellant has so far departed from the accepted and usual

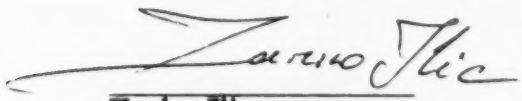
course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

As seen in Petition and in this Brief it has been GROSS MISCARRIAGE OF JUSTICE done to Ilic. Ilic have high hopes that this Court have power and will to correct it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



Zarko Ilic, pro se
2500 Bay Leaf Dr.
Orlando, Florida 32837
(407) 859-7479